

(b) With the approval of RUS, a Borrower may fund the cost of consulting services in connection with the review by RUS of an Application by such Borrower. Such funding shall be provided pursuant to the terms of a Funding Agreement between the Borrower and the Consultant designated by RUS.

(c) RUS may not, without the consent of the Borrower, require, as a condition of processing any Application for approval, that the Borrower agree to pay the costs of a Consultant hired to provide services to RUS.

(d) The government shall retain sole discretion in the selection of Consultants to provide services to RUS and the form of contract utilized. RUS may either use the services of one or more Consultants retained under Retainer Contracts or the government may elect to retain a Consultant not otherwise on retainer. The government shall have sole discretion to prescribe terms and conditions of Consultant Contracts. The Borrower may bring considerations to the attention of the government which the Borrower deems pertinent to the selection process.

(e) RUS shall retain sole discretion as to whether to further pursue use of an outside consultant for the relevant application in the event the Borrower does not enter into the agreements referenced in § 1789.158(c)(3)(iii) within 60 days of the government providing to the Borrower the information set forth in § 1789.158(c)(3).

§ 1789.153 Borrower funding.

Borrowers shall use their general funds for the purposes of funding consultant services hereunder. Borrowers may not use the proceeds of loans made or guaranteed under the RE Act for costs incurred by Borrowers pursuant to the funding of consultant services for RUS.

§ 1789.154 Eligible borrowers.

All Borrowers are eligible to fund consultant services under this part.

§ 1789.155 Approval criteria.

RUS will consider approving the use of consultant services funded by a Borrower on a case by case basis taking into account, among other matters, the following:

(a) Whether such services are required to facilitate timely action on a Borrower's Application. RUS shall determine what represents timely action with respect to each Application considering, among other matters, the review period normally required for such projects by RUS and other lenders and the consequences to the Borrower of adjusting the review period.

(b) The availability of staff resources, the priorities of other projects then before RUS, and the efficiencies to be realized from the use of consultant services.

(c) Whether it is in the best interest of RUS to use Borrower-funded Consultants. Certain types of projects, such as those involving issues of program-wide significance, may not be well suited for the use of Borrower funded Consultants.

§ 1789.156 Proposal procedure.

(a) In the event RUS determines that consideration should be given to the use of a Borrower-funded consultant in connection with the review of an Application, the RUS Regional Director or the Director of the Power Supply Division, as appropriate, will discuss with the Borrower the nature of the Application and the projected review period required of RUS. If RUS concludes that the projected review period will not result in timely action on the Application, and after being so notified in writing by RUS the Borrower wishes to fund consultant services to facilitate RUS review, the Borrower shall submit to the same Director a funding proposal. The proposal shall set forth the following:

(1) Identification in the heading or caption as a Notice of Proposal to Fund Consulting Services;

(2) Borrower's REA/RUS designation;

(3) Borrower's legal name and address;

(4) A description of the Application, critical issues and concerns relating to the Application, time deadlines, and the consequences of any delays in RUS review;

(5) A description of the consulting service(s) that would facilitate timely RUS review of the Application; and

(6) Such additional documents and information as RUS may request.

(b) RUS will review the Notice of Proposal to Fund and any additional information RUS deems relevant in determining whether to proceed with procuring Borrower funded Consultants. If RUS proposes to utilize Legal Consultants, RUS must obtain the concurrence of the Office of General Counsel (OGC) of the Department of Agriculture. RUS will notify the Borrower in writing of its determination.

§ 1789.157 Consultant contract.

(a) The Federal Acquisition Regulation (FAR), 48 CFR Ch. 1, and the Agriculture Acquisition Regulation (AGAR), 48 CFR Ch. 4, shall apply to all Consultant Contracts entered into pursuant to this part except as provided in this section.

(1) Contracts for Legal Consultants shall provide for a technical representative from OGC.

(2) All Consultant Contracts shall provide for an escrow account funding mechanism pursuant to this part and for the government's sole discretion in determining whether payments are to be made from the Escrow Account to the Consultant.

(3) All Consultant Contracts shall provide that payment of all obligations for work performed thereunder must be satisfied by amounts available in the Escrow Account; with the exception of the annual retainer fee, if any, Consultants shall not be entitled to any payments from the government.

(b) The provisions of paragraph (a) of this section shall be given prominent emphasis in requests for proposals issued under this part.

§ 1789.158 Implementation.

(a) Upon making a determination to go forward with Borrower funding for consulting services, RUS shall initiate a procurement request for a Consultant to provide the services. The government may either contract with a Consultant on a case by case basis or elect to use a Consultant pursuant to an outstanding Retainer Contract. The Borrower will not be informed of the Consultant selected until such time as the government provides the information set forth in paragraph (c)(3) of this section.

(b) If the government determines to contract with a Consultant on a case by case basis, the government shall notify the Borrower of the applicable procedures.

(c) If the government determines to contract with a Consultant under an outstanding Retainer Contract, the following procedures will normally apply:

(1) Pursuant to the terms of the contract, the government will prepare a draft Task Order requesting consultant services in connection with the review of the Borrower's Application. The draft Task Order shall set forth for the Consultant's review and acceptance, a description of the services to be provided and applicable time frames for the provision of such services.

(2) The government will request that the Consultant:

(i) Notify the government as to the acceptability of the form and substance of the draft Task Order;

(ii) Notify the government as to its ability to provide a satisfactory conflict of interest certification consistent with the requirements of the FAR (48 CFR ch. 1); and

(iii) Provide a cost estimate for the draft Task Order.

(3) When the government is satisfied with the response(s) received pursuant to paragraph (c)(2) of this section, the government shall promptly provide to the Borrower:

(i) A copy of the draft Task Order identifying the Consultant;

(ii) The Consultant's cost estimate for the draft Task Order; and

(iii) Contract information required to enable the Borrower to develop a Funding Agreement, an Escrow Agreement and an Indemnification Agreement (the "agreements").

(4) The Borrower shall develop and submit to the government for approval executed originals of:

(i) The agreements; and

(ii) A certified copy of a resolution of the board of directors authorizing the Borrower to enter into the agreements and to take such other action as is necessary to effect the purposes of the agreements.

(5) Upon receiving written RUS approval of the agreements and the form and substance of the board resolution, the Borrower shall: